PROVINCE OF BRITISH COLUMBIA

A PROPOSAL FOR MERGER OF THE FEDERAL COURT OF CANADA INTO THE PROVINCIAL SUPERIOR COURTS

AUGUST, 1989

SUBMITTED FROM:

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"Neither from the point of view of juristic principle nor from that of the practical and efficient administration of justice can the division of courts into state and federal be regarded as sound."

- Dixon, "The Law and the Constitution" (1935), 51 Law Quart. Rev. 590 at p. 606

Introduction

The long standing position of British Columbia with respect to the Federal Court of Canada has been that the establishment of the Federal Court of Canada is wholly unnecessary and is not only a wasteful expenditure of public funds but has resulted and will yet result in practical disadvantages and inconveniences to the citizens of Canada.

This paper advances the position that the intervening 14 years of experience with the Federal Court of Canada have served only to underline the validity of that position. Accordingly, at a time when court reform is an item high on the agenda of governments, when periodic federal proposals to modify Federal Court jurisdiction have been inadequate to cure the ills plaguing the Court, and amidst rumours of a proposed expenditure of funds for a new Federal Court headquarters in Ottawa, British Columbia considers it appropriate to reinvigorate its call for the transfer of Federal Court of Canada jurisdiction to provincial superior

courts to provide a unitary court system such as existed in Canada at Confederation.

Apart from the fiscal benefits associated with restoring a unitary court system to Canada, such reform would sit comfortably within our system of divided legislative power. But most important, the return to a unitary court structure would advance the paramount goal of any judicial system which is to serve the public by promoting the just, speedy and inexpensive determination of every proceeding on its merits.

The first section of this paper is descriptive, and examines the historical, legislative and constitutional underpinnings of the Federal Court of Canada. Then, after laying a foundation in theory for the proposition that, at least in Canada, the public is better served by a unitary rather than a dual court system, this proposition is proved in practice by examining the actual workings of the Federal Court in each of its principal areas of jurisdiction. Finally, having shown that the arguments used to justify creating (and continuing) the Federal Court of Canada are insufficient to overcome the presumption in favour of a unitary court system, a working proposal to achieve a unitary court system is advanced.

1. Historical, legislative and constitutional underpinnings of the Federal Court of Canada

By virtue of section 129 of the Constitution Act, 1867, the system of superior, county and inferior courts existing in the provinces before Confederation was expressly continued. Thus, when the Constitution Act, 1867 came into force, its immediate effect was to create a unitary court system for Canada. Each province did possess a separate judicial hierarchy, with the Privy Council (and later the Supreme Court of Canada) at its apex, but the system was unitary in the sense that the courts administered all laws in force in the Dominion, whether enacted by Parliament or a Legislature: Valin v. Langois (1879), 3 S.C.R. 1 and Attorney General of Ontario v. Pembina Exploration Canada Limited, [1989] 1 S.C.R. 206 at pp. 217-220. Unlike legislative authority, judicial authority was not fragmented according to subject matter.

Although the court system was not encumbered by any "division of powers" in its operation, a form of federal/provincial "collaboration" did nevertheless inform its structure and composition. The Constitution's framers vested in the Provinces the power to constitute, maintain and organize provincial courts [s.92(14)], but the power to appoint the judges of the superior and county courts was

reserved exclusively for the Governor General [s. 96]. The convention that the federal government consults the provinces before making appointments to provincial superior and county courts has further enhanced federal/provincial collaboration in this area.

Nothing in the Constitution Act, 1867 required a change from a unitary to a dual court system, but such a change was authorized by section 101 of the Constitution Act, 1867 which states that:

> The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for ... the Establishment of any additional Courts for the better Administration of the Laws of Canada.

In 1875, Parliament first used this power to create an exception, albeit a limited exception, to the nation's unitary court system by creating the Exchequer Court of Canada: Supreme and Exchequer Court Act, S.C. 1875, c. 11.

As its name implies, the Exchequer Court of Canada was designed to act mainly as "a court of the Crown's exchequer", and to that end was given exclusive jurisdiction in all suits where a subject relied on a federal revenue law to sue the federal Crown. The Court was also given concurrent jurisdiction with provincial courts in civil suits at common law or equity in which the federal Crown was

the claimant. Thus, a subject alleging that the Crown had wrongly collected an import tax had to sue the government in the Exchequer Court. But where the Crown itself sued a subject based on a tax statute, or a contract, it had the option of choosing whether it would sue in federal court or provincial court.

The creation of a special court in 1875 dealing with the Crown's revenues has been linked to the convenience of government and its law officers who were concentrated exclusively in the City of Ottawa: Goldie, "Notes on the Federal Court" (1977) The Advocate, p. 17. That the Court's creation was regarded as a minor exception to the otherwise unitary nature of Canada's court system is evidenced in the concern voiced in the House of Commons in 1875 as to whether there would be sufficient judicial work for the court to perform: Law Society of Upper Canada, "Federal Court of Canada: Practice and Procedure" (1974) at p. 12.

Periodic additions to the Exchequer Court's jurisdiction between 1875 and 1971 resulted in a significantly greater role for the Court as an adjunct to the court system in place in Canada at Confederation. Its exclusive jurisdiction as repository for suits against the Crown was expanded in 1887 to encompass all litigation commenced

against the Government of Canada. By 1891, the court acquired exclusive jurisdiction as between subject and subject over some aspects of intellectual property law (patents, copyright and trademarks) and concurrent jurisdiction over admiralty law. In 1960, Parliament again expanded the Court's role by deeming it a "superior court of criminal jurisdiction" for the purpose of dealing with certain offences under the Combines Investigation Act. The Court was also granted appellate jurisdiction in respect of decisions of various federal administrative authorities.

The establishment of the Federal Court of Canada on June 1, 1971, pursuant to the Federal Court Act, R.S.C. 1970, c. 1 represented the high water mark in Parliament's efforts to create a dual court system for Canada. The Court was divided into a Trial Division and an Appeal Division. Although the Federal Court Act expressly declared the Court to be a "superior Court", this did not change the reality that the Court is a statutory court, without inherent jurisdiction, allowed to exercise only those powers conferred by statute: Commonwealth of Puerto Rico v. Hernandez, [1975] 1 S.C.R. 228 at p. 232.

The Federal Court inherited all the powers and jurisdiction of its predecessor. However, additional jurisdiction was

also conferred on the Court, with the result that today the aggregate of the Court's jurisdiction may conveniently be understood under to the following groupings:

A. Civil Actions involving the federal Crown

(a) Exclusive jurisdiction to hear all lawsuits launched by a subject against the federal Crown, except for damages claims under $1000, in which case jurisdiction is concurrent with provincial courts;

(b) Concurrent jurisdiction to hear lawsuits suits commenced by a subject against an officer or servant of the Crown for anything done or omitted to be done in the performance of his duties;

(c) Concurrent jurisdiction over lawsuits brought by the Crown against a subject;

(d) Concurrent jurisdiction to settle controversies between provinces or between Canada and a province, where the relevant province has passed legislation to that effect;

B. Judicial Review Jurisdiction

Exclusive supervisory jurisdiction over "federal boards, commissions, or other tribunals" by means of the prerogative writs and other extraordinary remedies;

C. Claims between subject and subject

(a) Industrial property (patent, trade-mark, copyright): Exclusive jurisdiction where a subject seeks to expunge or impeach another person's patent, trade-mark or copyright, but concurrent jurisdiction where a subject claims his patent, trade-mark or copyright has been infringed.

(b) Admiralty law: concurrent jurisdiction where relief is sought in respect of admiralty law or any other law of Canada coming within the subject matter of navigation and shipping;

(c) Bills of Exchange and Promissory Notes: Concurrent jurisdiction where the Crown is a party to the proceedings;

(d) Aeronautics: Concurrent jurisdiction

(e) Interprovincial works and undertakings: Concurrent jurisdiction

D. Appeals from federal statutory tribunals

Appellate jurisdiction under a number of federal statutes including the Citizenship Act, the Income Tax Act, and the Estate Tax Act.

E. Criminal Jurisdiction

By virtue of the declaration in section 3 that the Federal Court is continued as a superior court of record having civil and criminal jurisdiction, the Federal Court Act vested in the Federal Court the capacity to receive general criminal law jurisdiction.

Despite the introduction of several reform proposals by the federal government and continued consultation with the Provinces, there has been no substantive amendment to the Federal Court Act since the creation of the Court in 1971. The latest reform proposal (1987), which would have modified the Court's jurisdiction, died with the last Parliament.

2. The Case Against a Dual Court System

Canada's most prominent constitutional scholars have argued persuasively that even though s. 101 of the Constitution Act, 1867 empowers Parliament to create federal courts which operate alongside the provincial courts, this is one power better left unexercised. For reasons of principle and practical expediency, a unitary court system serves the public more effectively than a dual court system ever could. Even the federal Government has admitted that "as a matter of general principle, it is neither practical nor desirable to have two judicial systems ...." (Proposals to Amend the Federal Court Act, August 29, 1983, The Honourable Mark MacGuigan, Minister of Justice and Attorney General of Canada), but has argued that the Court is a desirable exception to the general principle.

Professor Lederman's arguments against a dual court system, made in 1975 and reproduced in his book of essays entitled Continuing Canadian Constitutional Dilemmas (1981), nicely set the stage for what is to follow in this paper and it is therefore convenient at this juncture to repeat some of his arguments in full:

> The unitary character of the Canadian judicial system, province by province, culminating in the Supreme Court of Canada as the "General Court of Appeal" for all of

Canada, is a great advantage to the individual citizen. For the most part, he need look only to one court system when he takes a case originally to a trial court and later on appeal to the higher levels of the system. Because the judiciary are independent of both cabinets and parliaments, this can be done without prejudice to the federal division of legislative power by subjects. In any given case, the courts can administer the law in one operation whether federal statutes, provincial statutes, or a combination of the two are involved. Indeed, often a combination of federal and provincial laws is involved in the problem a citizen brings to court, so that a merger of judicial power to deal with both is almost a matter of necessity. This is a point that has seldom been appreciated and is much misunderstood.

... But, some people point out that in the United States there are two separate systems of courts - a state court system in each state and a federal court system for the whole country, the latter culminating in the Supreme Court of the United States .... [T]here is no elegant federal dualism by subjects as between the two court systems in the United States; nor was it ever intended, by the Founding Fathers of the American Constitution that there should be. Had they intended this, it would have been impossible anyway, for the reasons of principle I have given .... [T]he dualism of the American judicial system taken as a whole brings with it many complications that are not present if you have only a single system of courts. In the United States, for instance, the question arises as to when you might stop proceedings in a federal court by another party because you have already raised the matter before a state court, and vice versa. The rules about all the procedural issues of moving back and forth between the two court systems in the United States are very complex, and run to hundreds of pages in the rule books. This may be a good system for the United States because it is a country with ten times the population of Canada and needs many more courts than we do. I very much doubt the need for such dualism in Canada.

The reason why I labour this point is twofold. In the first place, prominent scholars have argued that we should adopt a dual judicial system in Canada for reasons of federal theory. I have tried to show that there is no valid federal purpose to be served by doing this, and that all we would get would be greater

> complications in judicial procedure without any compensatory benefits whatever. So, I consider that we should stay with our much simpler unitary judicial system in this country.
>
> But, in the second place, we do have an issue of this sort looming on the horizon in Canada and it concerns the Federal Court of Canada .... Up to a point, the separate Federal Court can be justified, but certainly it should be carefully limited in jurisdiction, for otherwise it would encroach unduly on the general jurisdiction of the superior courts of the provinces. If this were to happen, we could get a serious and very damaging degree of judicial dualism in Canada.

There exists today a serious and very damaging degree of judicial dualism in Canada, and any "justifications" for a separate Federal Court are far outweighed by the additional cost and complication attending its existence. The arguments in favour of a separate Federal Court being insufficient to overcome the presumption in favour of a unitary court system for Canada, the solution lies not in tinkering with the Federal Court's jurisdiction, but in dismantling the Court and merging its jurisdiction and judges into existing provincial court systems.

In his article entitled "Federalism and the Jurisdiction of Canadian Courts" (1981), 30 U.N.B.L.J. 9, Professor Hogg notes that "a federal system does not entail federalizing the judiciary." Thus, without any breach of federal principle, judicial power could remain undistributed or unitary in Canada. Any attempt to fracture judicial

authority along the lines of legislative subject matter not only reflects a fundamental misconception about the nature of judicial power, but raises a spectre of expense, inconsistent verdicts, forum shopping, delay and complexity which cannot be justified.

In the second edition of his text Constitutional Law of Canada (1985), Professor Hogg describes the Federal Court of Canada as "a step in the direction of the dual court system in the United States, a system which leads to multiple litigation and complex jurisdictional disputes". After giving examples of the jurisdictional problems which have plagued the Federal Court, Professor Hogg concludes:

> As noted earlier in this chapter, Canada does not need a dual court system. The provincial courts have general jurisdiction over all causes of action; the judges of the higher courts are federally appointed; and consistency of decisions is guaranteed by the appeal to the Supreme Court of Canada. The existence of a parallel hierarchy of federal courts cannot fail to give rise to wasteful jurisdictional disputes and multiple proceedings. I accordingly regret the expansion of the federal-court system which has occurred in Canada since 1875.

Similar sentiments were recently echoed by Chief Justice McEachern in the case of Re Lavers and Minister of Finance (1985), 18 D.L.R. (4th) 477 (B.C.S.C.) at p. 479:

> Uncertain dual jurisdiction in different courts is a developing misfortune in this country as more and

> more cases fall easily within one jurisdiction or the other, and our citizens are never sure that great time and expense will not be wasted litigating in the wrong court. This is especially so now that increasing numbers of cases of a local or private nature seem to be heard in the Federal Court. In this connection one notices motor-vehicle accident cases, corporate take-overs, construction contract claims and many other diverse kinds of cases which also fall clearly within the jurisdiction of the provincial superior courts.
>
> The language of s. 18 should be reconciled with the recent jurisprudence which seems to recognize the right of litigants to bring their cases in the courts of general jurisdiction even where Her Majesty in the right of Canada is involved. Dual jurisdiction which exists in many countries without noticeable success seems to be increasing in Canada. I must leave it to Parliament to decide if dual jurisdiction is in the public interest. With great deference I suggest it is not, except perhaps in particular matters, if any, which are thought to require judicial specialization not available in the provincial superior courts.

There is accordingly a strong presumption in favour of a unitary court system for Canada. It is a presumption which may be rebutted only where exceptional and demonstrable need is shown to depart from a unitary court system. Whatever the position may have been in 1875 when the Exchequer Court was created, no such need has been demonstrated by the federal Government in recent times. Indeed, what <u>has</u> been demonstrated are the costly and cumbersome jurisdictional and constitutional difficulties inherent in the Court. A number of those difficulties are documented below, in the context of an examination each of the principal areas of the Court's jurisdiction.

3. Jurisdiction of the Federal Court

A. Claims by and against the federal Crown

The existence of a special federal court in which to sue or be sued by the federal Crown is not only unnecessary and anachronistic, but is positively harmful.

When the Exchequer Court was first created, two justifications were advanced for its creation as a court for the "better administration of the laws of Canada". First, as noted by Goldie, supra, the Court was said to be necessary for the convenience of government in circumstances where transportation was primitive and the Crown's law officers were wholly concentrated in the City of Ottawa. A second justification is conveniently captured in the comments of Attorney General Fournier (later Mr. Justice Fournier), introducing the 1875 bill creating the Exchequer Court:

> Everyone admitted that it was important that the Federal Government should have an institution of its own in order to secure the due execution of its laws. There might, perhaps, come a time when it would not be safe for the Federal Government to be at the mercy of the tribunals of the Provinces ... (cited in Audette, The Practice of the Exchequer Court of Canada, 2d ed. (1909), at p. 66).

Neither justification has any validity in 1989.

Sophisticated transportation systems and the existence of offices of the Department of Justice in every major Canadian city render convenience arguments insufficient to justify the creation of a separate court. Moreover, as noted by Goldie, supra, at p. 20, the Trial Division of the Federal Court now travels, but this merely serves to underline the unacceptability of a centrally located special Court created for the purpose of dealing with the Crown's revenue, or Crown causes in general. It is clear then that the convenience of the public is best served if litigants are given access to local courts advised by practitioners who are familiar with the local rules of those Courts.

On this point, it should also be noted that the establishment of one principal location in a province, for example Vancouver, where the Federal Court sits is totally inadequate to meet the needs of the population of a province spread over 365,000 square miles. Consider the litigant in Kootenays or five hundred miles away in Prince George or even further in Fort St. John. It is totally impractical for him or her to conduct the litigation from Vancouver. On the other hand, in the case of provincial courts there are over forty Supreme and County Court registries throughout the province where actions can be commenced and trials can be heard.

As to the rationale for the Court's creation reflected in the passage from Attorney General Fournier, no one would seriously maintain today that the federal Government either needs, or deserves, "protection" from the decisions of provincial courts, particularly where the judges of the superior courts are themselves federal appointees.

Nor can it be argued that there is anything unique or difficult about the law to be applied in cases involving suits by or against the Crown. In civil suits commenced by the Crown, the law to be applied is generally the private law applicable in the provinces. Indeed, for this reason, the Supreme Court of Canada has held that, in such cases, the relevant law is not a "law of Canada" and consequently the Crown is barred from suing in Federal Court: McNamara Construction (West.) Ltd. v. R., [1977] 2 S.C.R. 654.

These arguments would alone be determinative against the existence of a separate Federal Court to deal with civil actions by and against the Federal Crown even if it could be shown that the Federal Court's jurisdiction in such matters facilitated their smooth and simple resolution. In other words, the waste of tax dollars occasioned by an unnecessary federal court system would itself justify implementing the proposal for merger advanced herein.

But the justification for merger is even stronger because, far from being merely unnecessary, the existence of the Court is positively harmful to the the better administration of justice in Canada.

This is well documented and stems from the drafting of s. 17 of the Federal Court Act, together with the constitutional limitations on the Court's jurisdiction under s. 101 of the Constitution Act, 1867, as interpreted by the Supreme Court of Canada in cases such as Quebec North Shore Paper Co. v. C.P. Ltd., [1977] 2 S.C.R. 1054, McNamara Construction (West.) Ltd. v. R., [1977] 2 S.C.R. 654, R. v. Thomas Fuller Construction Co. (1958) Ltd., [1980] 1 S.C.R. 695 and Rhine v. R.; Prytula v. R., [1980] 2 S.C.R. 442. The following are but some of the realities of Federal Court jurisdiction which have led Courts and commentators alike to brand the present situation as "lamentable", "mystifying", "frightening" and "scandalous":

(a) a subject may sue the Crown only in Federal Court even though the Crown may sue the subject either in Federal or Provincial Court. This aspect of Federal Court jurisdiction has been roundly criticized: Zutphen Bros. Construction Ltd. v. Dywidag Systems International, Canada Ltd. (1987), 35 D.L.R. 433 (N.S.C.A.);

(b) Although a subject may sue the federal Crown only in Federal Court (because such a claim raises issues of "federal common law"), he may not sue another subject in that Court where there is no "applicable and existing Federal law": Quebec North Shore Paper, supra;

(c) Indeed not even the Federal Crown may sue in Federal Court unless the matter arises from applicable and existing federal law: McNamara Construction, supra;

(d) It is a difficult question whether in any given case there is sufficient "statutory shelter" to trigger Federal Court jurisdiction based on applicable and existing federal law: Rhine and Prytula, supra;

(e) Where the subject does sue the Crown in Federal Court, the Crown may not make a counterclaim or third party claim in Federal Court if it does not involve "applicable and existing federal law": Thomas Fuller Construction, supra.

One ugly manifestation of these rules is that, where the Crown is one of several defendants in a legal dispute, four different suits may have to be initiated to resolve all

issues of legal liability, as Professor Evans explains in (1981), 59 Can. Bar Rev. 124 at p. 139:

> (1) the Plaintiff must sue the Crown in Federal Court; (2) proceedings against other defendants must be instituted in a court in the appropriate province or abroad; (3) if held liable, the federal Crown can only sue for contribution in a provincial court; (4) other defendants can only claim contribution against the Crown in Federal Court.

Professor Evans concludes:

> A legal system capable of inflicting outrages such as these upon the parties to litigation over commonplace occurrences is manifestly functioning at an unacceptably low level. It would surely take some very special pleading indeed to convince an unfortunate client that that such bizarre consequences are dictated by fundamental constitutional considerations.

It should be noted that the reasoning employed in the cases above also calls into question the constitutional validity of s. 17(5)(b) of the Federal Court Act which purports to confer jurisdiction on the Federal Court where relief is sought against a person for anything done or omitted to be done in the performance of his duties as an officer of the Crown. To the extent that such a claim involves a claim against a defendant personally in tort, as opposed to against the Crown as principal, Quebec North Shore Paper implies that the Federal Court is without jurisdiction (see also Ingle v. R., [1984] 2 F.C. 57 (T.D.)). Therefore, a person suing both a Crown servant and the Crown for damages

arising out of the same delict must sue the servant in provincial court and the Crown in Federal Court.

The federal government, in its most recent proposal to amend the Federal Court Act, the Crown Liability Act and related legislation (August, 1987), has proposed to allay these ills by making the Court's jurisdiction concurrent rather than exclusive in respect of suits against the Crown, and empowering the Federal Court to stay proceedings commenced in that Court which, in the opinion of the presiding judge, would prevent the Crown from counterclaiming or instituting third party proceedings. (These proposals died on the Order Paper with the last Parliament).

A number of comments are in order concerning this proposal. First, concurrent jurisdiction in respect of claims against the Crown does not solve the constitutional and practical problem of a subject who is sued by the Crown in Federal Court not being allowed to issue a third party notice in that Court against another subject based on common law or provincial statute law: Quebec North Shore Paper, supra. A minimum of two lawsuits would still be necessary to settle such a dispute.

Second, because the Crown may not constitutionally commence an action in Federal Court where there is no "applicable and existing federal legislation", the whole question of when there is "sufficient statutory shelter" to enable the Crown to sue in Federal Court will continue to take up precious judicial time and resources (not to mention the time and resources of litigants): Rhine, supra. As regards the "Crown servant" provision, the question whether someone constitutes a Crown servant will also continue to arise.

Third, such reform begs the question of why, as a matter of sound policy, persons involved in claims by and against the Crown should be given the luxury of forum shopping while other disputants must be content with one court system.

Finally, the concession by the Federal Government that the superior courts should be empowered to deal with all claims brought against the Crown - not just those where relief claimed in under $1000 - is an implicit concession that the Federal Court of Canada is unnecessary to deal with such claims. This having been conceded by the amendment proposals, arguments that the law regarding Crown liability is "too difficult" or that a separate Federal Court is "necessary to consistently develop the law" on Crown liability now carry no weight. In any event, consistency in

the law is guaranteed by the appeal to the Supreme Court of Canada.

The efficient and effective administration of justice will not be served simply by modifying the Federal Court's jurisdiction regarding Crown suits in the manner proposed by the Department of Justice. The need for reform having been acknowledged, the logical reform is restore to provincial superior courts the exclusive authority to entertain all litigation involving the Crown.

B. Judicial Review Jurisdiction

The arguments in favour of the Federal Court's exclusive supervisory jurisdiction over "federal boards, commissions, or other tribunals" by means of the prerogative writs and other extraordinary remedies are similarly inadequate to overcome the presumption in favour of a unitary Court system for Canada. It is well to remember that before 1971, these tribunals were subject to judicial review in provincial superior courts.

The arguments advanced in favour of conferring exclusive jurisdiction in the Federal Court to judicially review federal statutory bodies may be summarized as follows:

(a) to allow various provincial superior courts to deal with the same federal agency depending on the situs of that agency's hearing would be inconvenient and produce contradictory decisions. In particular, difficulties might arise as to which provincial superior court had review powers in respect of a particular board's decision; there is also the danger of a multiplicity of interpretations across Canada of a tribunal's empowering statute: Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform" (1973), 23 U of Tor, L.J. 14 at pp. 22-25.

(b) the quantity and nature of judicial review proceedings involving federal statutory authorities justified the creation of a new court. Provincial courts do not possess sufficient expertise in the workings of these authorities, particularly given the random way in which such cases arise in the provinces: Mullan, "The Federal Court Act: Administrative Law Jurisdiction - a Paper for the Law Reform Commission of Canada" (1977), at pp. 61-63.

(c) given that a certain amount of statutory appeal work has always been handled by a federal court, it makes sense to have the same body dealing with these appeals

also handling judicial review applications: Mullan, ibid.

Each of these justifications for a separate Federal Court will be addressed in turn.

The argument that a particular decision of a "Canada-wide" federal board might give rise to litigation as to whether that decision is open to review in more than one Province (i.e., the Board holds hearings in Quebec but has its headquarters is in Ontario) is hardly a sufficient reason to create a legion of different jurisdictional problems - let alone bear the expense - of having a separate Federal Court. In any event, the cases that did address this problem before 1971 took the common sense position that the only court with jurisdiction to judicially review a tribunal decision is a court in the province where the decision was made: Mullan, supra, p. 23.

The concern that "contradictory decisions" by different Superior Courts may be made regarding the same tribunal is also overblown. In the first place, there is no empirical evidence that prior to 1971, this was a serious problem for any federal tribunal. Second, given that most such decisions would be made by the Courts of Ontario and Quebec,

it is highly unlikely that a "checkerboard" pattern of decisions in respect of the same decision by the same tribunal would arise. Third, given that judicial review is generally limited to errors of law and errors of jurisdiction, which principles are fairly well developed, the risk of fundamentally different approaches being taken by different provincial courts to the same act or type of act by the same tribunal is even further diminished. Fourth, provincial courts would undoubtedly strive for consistency of decisions in respect of the same tribunal. Fifth, even if contradictory decisions did on occasion arise, it is difficult to see how this would impair the operation of the tribunal anymore than in the case of a Corporate body which must abide by different provincial regulations of its undertaking across the country. Finally, consistency of decisions is ultimately guaranteed by the existence of the Supreme Court of Canada.

On a practical level, there is no evidence that inconsistent interpretations of empowering statutes was a problem before 1971 when Superior Courts in all 10 provinces exercised jurisdiction in relation to "Canada-wide" tribunals such as the Canada Labour Relations Board. Indeed, while warning of the "inherent risks" of such a problem in a unitary court system, Mullan concedes that "it is in fact difficult to

point to this having occurred in practice": Mullan, supra, p. 23.

Two further points are also in order. First, if different rulings by provincial courts as to the application, interpretation and even constitutionality of federal statutes such as the Criminal Code is regarded as consistent with the better administration of the laws of Canada, it is difficult to see how federal regulatory statutes warrant supervision by an entirely separate court. Second, that Court's exclusive jurisdiction does not guarantee consistent decisionmaking, as demonstrated by the Federal Court's own jurisprudence regarding whether administrative tribunals may apply the Canadian Charter of Rights and Freedoms: see, for example, Vincer (A-132-87), Bibi Alli (A-670-86), Tetreauly-Gadoury (A-670-86) and Poirier (A-659-88).

In the end, arguments of "inconsistency" fall well short of what is required to overcome the presumption in favour of a unitary court system.

The second set of arguments used to justify the existence of a separate Federal Court to judicially review federal statutory authorities emphasizes that provincial superior courts are not sufficiently expert to judicially review

federal administrative tribunals. A related point under this head is that, in any event, the courts of the provinces could not handle the increased case load brought about by the return of the jurisdiction to judicially review federal statutory authorities.

The argument that provincial superior courts are not sufficiently expert to judicially review federal administrative tribunals is oft repeated, but never demonstrated. No one has shown these courts were having difficulties judicially reviewing federal statutory bodies before 1971, let alone that their performance was inferior to the performance of the Federal Court itself since 1971. Evans, Janish, Mullan and Risk are forthright in conceding this point in their textbook on Administrative Law, 3d ed. (1988) at p. 993:

> Whether aspirations with respect to greater expertise in relation to the affairs of federal statutory authorities have been realized [by the Federal Court of Canada] is a much more difficult judgment to make. It is made more so by the fact that it is difficult to dissociate any consideration of the quality of the Federal Court from the fact that the Court has had a large number of jurisdictional problems to resolve since its creation, both in its judicial review jurisdiction and elsewhere.

The reason why no one has been able to show that provincial superior courts are inadequate to the task of judicially reviewing federal administrative tribunals is that it is

just not so. The principles of administrative law cut across the spectrum of federal and provincial administrative tribunals. Even a summary perusal of the Federal Court Reports reveals that the judicial review issues typically dealt with by the Federal Court - apart from the jurisdictional problems created by the Federal Court Act itself - are no different from those typically dealt with by provincial superior courts in respect of provincial administrative authorities.

At its root, judicial review of all administrative action is concerned with vindicating the following principle so succinctly captured by the Law Reform Commission of Canada in its Report on Judicial Review and the Federal Court (1980) at p. 5:

> In a society committed to government under law, the role of the courts as a check on illegal or arbitrary action is crucial. Upon them fall the responsibility of reviewing actions of state organs to ensure that they do not stray beyond the limits of the law. Nor are the courts restricted to the mere letter of the law. Under the rubric of natural justice, they also review state action from the point of view of fundamental fairness. This role is vital to the political organization of our society.

Relevant factors that all courts take into account in reviewing tribunals for illegal action and for breaches of natural justice and fairness include the language and purpose of the statutory provisions in issue, the nature of

the decision impugned, the importance of the interest affected and the institutional needs and competence of the tribunal being reviewed. These principles, which the Superior Courts of the provinces are adept and experienced at applying, do not change according to whether the decision impugned is that of a federal rather than a provincial tribunal. Indeed, leaving aside the peculiarities of the Federal Court Act and the plethora of jurisdictional problems attending its application, no case, textbook or other authority has ever suggested that the mere fact that a decision emanates from a "federal" authority warrants invoking special rules for judicial review. The general principles of judicial review articulated in Federal Court cases are universally applied in respect of provincial tribunals and vice-versa, as evidenced by the fact that the Supreme Court of Canada applies precedents from both interchangeably.

It is true that some federal tribunals possess unique characteristics which must be taken into account in exercising this authority, and it is also true that some federal statutes are elaborate and complicated in their application. But this is also the case at the provincial level, and the courts regularly and effectively exercise

their judicial review jurisdiction in the face of this reality.

It is well to remember that in proceedings for judicial review, the courts are not and should not be asked to exhibit a broad and detailed knowledge of the intricate workings of a particular tribunal's area of specialization. Given the recent philosophical trend to "judicial deference", the requirement for such knowledge, which would tend invite judicial "second-guessing" of administrative decisions, would be regarded by many as a retrograde step. In exercising their superintending jurisdiction over statutory tribunals, courts are properly concerned with general principles of legality and fairness. As observed by the Law Reform Commission, all courts are expert in considering these questions (p. 6). There is every reason to believe that "generalist" Courts would apply these principles in respect of federal tribunals every bit as well as they do in respect of provincial authorities.

To the extent that specific agencies exhibit problems which do go to the root of their specialized jurisdiction, the Attorney General of British Columbia agrees with the the Law Reform Commission of Canada at p. 6 of its Report, supra,

that the solution lies at the agency level. It does not lie in creating a separate federal court.

Arguments that the Provincial Courts could not handle the increased case load brought about by the return of the jurisdiction to judicially review federal statutory authorities are more difficult to assess. However, there is reason to believe that the infusion of new cases into the arteries of existing Provincial court systems would be cushioned by a number of factors. First, the multitude of cases on Federal Court "jurisdiction" - both generally and as between the Trial Division and the Court of Appeal - which presently occupy federal and provincial court time, would be eliminated. On this point, it is worth noting that, with respect to the Federal Court's judicial review jurisdiction, the Federal Court of Canada Service, updated as of May, 1989, lists over 160 annotations of reported decisions dealing with Federal Court judicial review jurisdiction generally, the jurisdiction of the Federal Trial Division and the Federal Court of Appeal respectively, and the jurisdiction of the Federal Court and the provincial courts respectively. (There are undoubtedly countless other unreported judgments addressing these issues.) Second, the absorption of the present complement of Federal Court Judges into provincial superior courts in proportion to the amount

of work done by the Federal Court in each province would accomodate the additional workload (this proposal is discussed in Section 5, infra). Third, the appointment of additional judges could be effected if in some provinces the volume of cases so required (but there is no clear indication that this would be necessary).

What is clear is that logistical difficulties in returning jurisdiction over federal administrative tribunals to the provincial superior courts are not in themselves sufficient to stand in the way of positive reform.

The third argument in favour of a separate federal court is that because certain statutory appeal work has always been handled by a federal court, it makes sense to have the same body dealing with these appeals also handling judicial review applications.

Contrary to the logic relied upon in this argument, it does not "make sense" that just because a federal court has "always" been assigned statutory appeal work in respect of a particular agency, that tribunal should also exercise judicial review jurisdiction over that agency. Indeed, if convenience is the objective, the balance of convenience clearly lies in rejecting the expense, jurisdictional

problems and general inconvenience to litigants occasioned by the creation of a separate federal court.

Moreover, as indicated above, the fact that conferring such jurisdiction may tend to increase the "expertise" of the court in the workings of the tribunals being reviewed is not necessarily a good thing. In the first place, there is the tendency for the Court to be less deferential to the decisions of the tribunal. And, as noted by Mullan, supra, at p. 61, some might also rely on the old proverb about familiarity.

In making the point that the arguments advanced in favour of conferring judicial review jurisdiction on the Federal Court do not withstand scrutiny, reference has been made to the "jurisdictional problems" which arise from this grant of judicial review authority to the Court.

The following are just some of jurisdictional problems which the Court's judicial review jurisdiction have created:

(i) After dozens of cases on point, the question of what statutory authorities are caught by the Act - i.e., what constitutes a "federal board, commission or other tribunal" - within the meaning of s. 2 of the Federal

Court Act is still frequently litigated, both in provincial courts and the Federal Court.

(ii) In the same category is the question of when the Federal Court of Appeal, as opposed to the Trial Division, has original jurisdiction over a particular matter.

(iii) Another vexing question arising in the context of the Federal Court's administrative law jurisdiction is the question of the respective powers of the Federal Court and the provincial courts to deal with Constitutional questions: see Kieran Bridge, "Judicial Review of Federal Legislation and Administrative Action in the Federal and Provincial Courts: The Law Since Jabour v. Law Society of British Columbia" (1988), 9 Adv. Q. 77.

On this third point, the the Supreme Court of Canada has held that Parliament may not interfere with the inherent jurisdiction of provincial superior courts to declare federal statutes to be ultra vires Parliament on division of powers grounds: Jabour v. Law Society of British Columbia, [1982] 2 S.C.R. 307. Nor can it interfere with the authority of these Courts to determine whether a body such as the Canada Labour Relations Board has properly decided

that a case falls within its jurisdiction rather than provincial jurisdiction: C.L.R.B. v. L'Anglais, [1983] 1 S.C.R. 147.

However, the question whether the Federal Court possesses concurrent jurisdiction where division of powers matters arise is less certain. Although the Federal Court of Appeal may address a division of powers issue where a tribunal refers a constitutional question to it under s. 28(4) of the Federal Court Act (see Northern Telecom Canada Ltd. v. Communication Workers of Canada, [1983] 1 S.C.R. 733), the Trial Division does not possess any such power, at least where a privative clause is present: Re Brink's Canada Ltd. and C.L.R.B., [1985] 1 F.C. 898 (T.D.).

If Brink's is correct, and applies broadly, the upshot of all these cases is that a litigant wishing to challenge a federal tribunal decision on more than one basis, one of which is division of powers argument, may have to bear the expense and risk of inconsistent findings by commencing two separate court actions to advance both his arguments. But if Brink's is wrong or limited to its facts, then a claimant may engage in forum shopping in respect of the place in which he intends to advance his arguments. Either way, the result is unsatisfactory.

The result is even less satisfactory when a Charter argument is raised. For example, some cases have held that provincial superior courts have no jurisdiction whatsoever to consider Charter challenges to federal legislation or decisions of federal tribunals in the context of a challenge to a decision of a federal tribunal: Re Gandam and Minister of Employment and Immigration (1982), 140 D.L.R. (3d) 363 (Sask. Q.B.). However, others reject this view and hold that whenever federal legislation or a tribunal decision is challenged based on the Charter, the Superior Courts have "at least co-ordinate jurisdiction ... with the Trial Division of the Federal Court": Re Lavers and Minister of Finance (1985), 18 D.L.R. (4th) 477 (B.C.S.C.). Yet a third group of cases has advocated a middle ground, holding that a provincial superior court may declare a federal statute to be contrary to the Charter but may not declare the actions of federal boards contrary to the Charter: R.L. Crain Inc. v. Couture (1983), 6 D.L.R. (4th) 478 (Sask. Q.B.).

Leaving aside the inevitable expense, delay and inconvenience caused to litigants presently faced with these contradictory judgments, even a prompt decision by the Supreme Court of Canada as to which of the three positions prevails would not far advance the efficient administration of justice.

For instance, if Gandam is correct, the result is that a plaintiff wishing to raise both Charter and division of powers arguments against federal legislation in the context of a decision by a federal tribunal may have to launch two court actions. He must sue in Federal Court on the Charter question and in provincial superior court on the division of powers question (at least in the Brink's situation).

If Lavers is correct, the result is that a person may engage in forum shopping in respect of a Charter challenge to a federal tribunal decision or the Act under which it was made. Also, if a natural justice argument arises in the context of such a case, the person may have to commence separate proceedings in the Federal Court.

If R.L. Crain is correct, the result is that forum shopping is possible at least in relation to a challenge made to a federal statute.

The evils of forum shopping, multiple litigation and inconsistent decisions are the unavoidable by-product of a dual court system created in the face of constitutional rules which guarantee the role of provincial superior courts

in overseeing the constitutionality of all legislative and administrative action.

Neither judicial ingenuity nor legislative tinkering will cure these ills. Nor will the hope that there will be fewer constitutional challenges to administrative decisions and their empowering statutes make these problems disappear.

As with the Court's civil law jurisdiction in respect of the Crown, the only solution to the wasteful jurisdictional malaise associated with Federal Court practice is to eliminate this jurisdiction from the Federal Court of Canada.

C. Claims between subject and subject

In the 1983 Proposal by the Minister of Justice to Amend the Federal Court Act, the following statement appears concerning the Federal Court's jurisdiction between subject and subject (p.5):

> As noted above, the Federal Court exercises jurisdiction over particular matters in respect of which the Court has had special competence and procedural advantages (for example, industrial property and admiralty). Section 23 of the 1971 amendments added new areas of jurisdiction outside the Court's traditional fields of expertise which, however, have been largely ignored by the legal profession, including bills of exchange, aeronautics, and interprovincial

> works and undertakings. Consideration will be given to repealing section 23, thereby restoring the matters referred to entirely to the provincial courts.

The Attorney General of British Columbia agrees that litigation between subject and subject involving commercial paper, aeronautics and interprovincial works and undertakings should be eliminated from Federal Court jurisdiction.

However, British Columbia would go further and propose that the Federal Court's jurisdiction over Canadian admiralty law and industrial property also be eliminated.

Admiralty Law

Admiralty law encompasses an extensive body of maritime causes including marine insurance, liability for personal injury or loss of life caused by a ship and liability in contract and tort for loss or delay of a ship's cargo or the storing of its goods in port pending delivery to a consignee. As held by McIntyre J. in ITO-International Terminal Operators v. Miida Electronics, [1986] 1 S.C.R. 752 at p. 771, Canadian maritime law includes all that body of law which was administered in England by the High Court on its Admiralty side in 1934 as such law may, from time to

time, have been validly amended by Parliament, and as it was developed through judicial precedent to date.

Four observations concerning this body of law are in order. First, despite its reputation as being a subject-area which is both technical and traditional, the reality is that, for the most part, the same principles of contract, tort and bailment apply to admiralty cases as to other cases. Second, because Canadian maritime law is a body of federal law, it is uniform throughout Canada: ITO, supra, at pp. 776 and 779. Third, although this jurisdiction has been exercised by federal courts since 1891, provincial superior courts have always exercised concurrent original jurisdiction in admiralty cases: A.G. Ontario v. Pembina Exploration Canada Ltd., [1989] 1 S.C.R. 206 at p. 216. Fourth, a provincial statute conferring jurisdiction on a Small Claims Court to hear "any action" where the amount claimed does not exceed $1000 is effective to confer jurisdiction to decide admiralty matters: Pembina, supra.

Given that admiralty law is uniform across Canada, may be applied by inferior and superior provincial courts, and is informed by general common law principles, there is no reason why the Federal Court should continue to exercise jurisdiction over such matters. The mere fact that the

Court and its predecessor have possessed this jurisdiction since 1891 is no answer to this claim. As noted by McIntyre J. in another context: "An historic approach may serve to enlighten, but it must not be permitted to confine".

The continued jurisdiction of the Federal Court in admiralty matters is expensive, unnecessary and serves only to encourage forum shopping by litigants and practitioners. Further, the volume of admiralty cases in Canada is not sufficient justify the creation of a separate federal court. For these reasons, this jurisdiction should be eliminated from the Federal Court of Canada.

Industrial Property

As noted above, the Federal Court's jurisdiction over industrial property matters (patent, trade mark, copyright) is partly exclusive and partly concurrent. Exclusive jurisdiction exists where a subject seeks to expunge or impeach another subject's patent, trade mark or copyright. Concurrent jurisdiction exists where a subject claims his patent, trade mark or copyright has been infringed.

It is submitted that jurisdiction over infringement actions should be returned exclusively to the provincial superior courts.

Infringement actions are regularly commenced in provincial superior courts. This is so for a number of reasons. First, for persons outside of large Canadian centers, commencing an action in Federal Court is expensive and inconvenient. Related to this is the fact that many counsel are unfamiliar with Federal Court practice and prefer to bring the matter in local courts where the procedure is familiar.

Third, experience has shattered the myth that "intellectual property" issues are somehow more difficult than other types of cases and that specialist judges are necessary to deal with these issues. The supposed expertise the Federal Court might gain from its exclusive jurisdiction in expungement actions has <u>not</u> proved attractive to litigants in infringment actions, where jurisdiction is concurrent.

Fourth, because it is not unusual to see, for example, an action for trade mark infringement combined with an action for passing off at common law, it is necessary to commence the litigation in provincial court. For the constitutional

reasons stated by the Supreme Court of Canada in Quebec North Shore Paper, supra, the Federal Court has no jurisdiction over the common law tort claim. Thus, a litigant commencing an action in Federal Court would have to commence a second provincial action to resolve all issues raised by his case. In addition to not having jurisdiction over tort claims in this area, the Federal Court is also without jurisdiction over a suit between citizens as to the validity of a contract respecting the settlement of a patent infringement action: Flexi-Coil Ltd. v. Smith-Roles Ltd. (1980), 50 C.P.R. (2d) 29 (F.C.T.D.), or for breach of patent licence agreement.

To the extent that an infringement action may be resolved fully either by the Federal Court or a provincial court, concurrency is unnecessary and promotes forum shopping. To the extent that such an action may only be resolved fully by launching it in Superior Court, this demonstrates once again that the constitutional constraints on the Federal Court's jurisdiction render it inadequate and superfluous in respect of complex litigation.

The Federal Court's exclusive jurisdiction to entertain actions to expunge patents, trade marks or copyright is mainly in the nature of an appeal from the "internal

process" by which industrial property is registered. Accordingly, this aspect of Federal Court jurisdiction is discussed under the heading "Administrative Appeals" below.

D. Administrative Appeals

The Court's jurisdiction in respect of judicial review of administrative action has been discussed above. However, a significant amount of the Court's administrative law work is also taken up dealing with appeals from the decisions of statutory bodies. The Court's exclusive jurisdiction to expunge patents, trade marks and copyright falls into the category of administrative appeals.

As a general proposition, the Federal Court of Appeal considers appeals in all cases where a right of appeal to the Federal Court is created by statute. However, where an appeal is brought under the Citizenship Act, the Income Tax Act, the Estate Tax Act, and a few other selected federal statutes, the appeal is to the Trial Division by way of trial de novo. As well, the judges of the Trial Division have been designated umpires for the purpose of appeals under the Unemployment Insurance Act. These U.I.C. appeals are extremely significant from a workload standpoint.

In recommending the merger of the Federal Court of Canada into provincial superior courts, the Attorney General of British Columbia does not suggest that jurisdiction to hear appeals under federal statutes should automatically be conferred on provincial superior courts. Jurisdiction to entertain appeals from the decisions of federal statutory bodies ought to be conferred on provincial superior courts only where Parliament considers that a matter warrants appellate jurisdiction and that judicial expertise is necessary to exercise this jurisdiction. In all other cases, where considerations of expertise and/or workload suggest that appellate jurisdiction is better exercised by a specialized tribunal, the logical course would be for Parliament to establish a federal administrative appellate tribunal (or tribunals) comprised of persons expert in the areas in which appeals would be entertained, as has been done in certain provinces.

It is convenient to note at this juncture that one "appellate" matter which should be reserved exclusively for the provincial courts is the jurisdiction to determine matters arising under the federal Expropriation Act. British Columbia agrees with the position taken by the Canadian Bar Association in 1978 that the taking of land without the consent of an owner is a matter of local concern

and interest, and the ends of justice are better served when expropriation issues are dealt with by local courts as distinct from a Court which may be perceived by the person affected, if only be reason of its name, to be arm of the executive branch. The provincial courts are familiar with the issues that arise in expropriation and are at once more accessible and more acceptable to the citizen making a claim. Accordingly, issues arising under the federal Expropriation Act should be dealt with by provincial courts.

E. Criminal Law Jurisdiction

In 1960, Parliament first conferred criminal law jurisdiction on the Exchequer Court of Canada for the limited purpose of dealing with certain offences under the Combines Investigation Act. With the passage of the Federal Court Act, Parliament recognized this criminal law jurisdiction by declaring generally that the Court is continued as a superior court of record having civil and criminal jurisdiction.

As noted by the Canadian Bar Association's Report on the Federal Court (1978), it makes little sense from a practical point of view to introduce into a Court otherwise wholly concerned with civil matters a proceeding which would

otherwise be heard in accordance with the procedure of criminal courts.

The principal areas of criminal law into which the Federal Court has traditionally ventured have included (a) presiding over prosecutions launched under certain sections of anti-combines legislation where the accused consents to the institution of proceedings in the Federal Court, and (b) judicially reviewing decisions made in extradition proceedings by a superior court judge on the basis that the judge was acting persona designata under the Extradition Act and thus constituted "a federal board, commission or other tribunal" within the meaning of the Federal Court Act: Commonwealth of Puerto Rico v. Hernandez, [1975] 1 S.C.R. 228.

The Federal Court's concurrent jurisdiction to preside over the prosecution of criminal offences under anti-combines legislation (with the accused's consent) was continued in 1986 when the old Combines Investigation Act was replaced by the Competition Act.

It is difficult to see the rationale for having vested the Federal Court with concurrent jurisdiction to hear certain anti-combines offences, and then only with the consent of

the accused. The grant of concurrency only serves to underline the unnecessary nature of Federal Court jurisdiction, and belies contrary arguments based on the Court's own "expertise" and the dangers of "inconsistent decisions". What's more, the precondition that the accused must consent before Federal Court jurisdiction is triggered seems to be an implicit concession by Parliament itself that, prima facie, the Federal Court is less well suited to administer criminal laws than are the provincial courts. The Attorney General of British Columbia therefore calls for the return of exclusive jurisdiction over all criminal offences to the provincial courts.

As to the Court's jurisdiction to review the decisions of section 96 judges acting under the Extradition Act, the Supreme Court of Canada has itself, thankfully, ended the prospect of Federal Court jurisdiction in this area in Minister of Indian Affairs and Northern Development v. Rainville, [1982] 2 S.C.R. 518. In Rainville, the Court expressly overturned Hernandez, holding that whenever a statutory power is conferred upon a s. 96 judge, the power should be deemed exercisable in an official capacity as representing the Court, unless there is express provision to the contrary. There is no such express provision in the Extradition Act. Accordingly, the Federal Court may no

longer judically review decisions made in extradition proceedings.

The Court's authority to judicially review matters of a quasi-criminal nature, such as discipline proceedings in federal correctional institutions, should also be excised from federal court jurisdiction. In addition to the general reasons noted in Section 3(B), supra, for the elimination of the Court's judicial review jurisdiction, the Attorney General agrees with the view expressed by the Canadian Bar Association that the courts which daily try and sentence people are best suited to deal with issues arising out of their confinement where those issues require resort to the courts.

In conclusion, given the serious practical problems facing Federal Court jurisdiction over criminal matters, it is submitted that the elimination of the Court's criminal law jurisdiction, to be conferred exclusively upon the provincial courts, would be a positive reform.

4. Canada-wide Orders

To this point, this paper has made the point that in virtually all areas of present Federal Court jurisdiction,

the elimination of that jurisdiction in favour of a unitary court system would better serve the public and improve the administration of justice in Canada. It has been shown that the arguments typically advanced to justify the creation of a Federal Court do not withstand close scrutiny.

However, an important objection to dismantling the Federal Court of Canada has not been dealt with thus far and merits separate discussion. That objection is that the return to a unitary court system would take away the significant practical advantages which flow from the fact that federal court orders and injunctions apply across Canada.

Two illustrations suffice to make the point. Consider first the person in a unitary court system seeking an interim or permanent injunction to restrain the infringement of a copyright which is being pirated in several provinces. For this person to fully vindicate his claim, he would have to bear the expense of launching numerous court actions and run the risk of receiving inconsistent decisions. This situation is far less satisfactory than being able to receive a single order in federal court which applies across Canada.

A second example, taken from the field of administrative law, might arise where a federal tribunal, such as the CRTC, makes an Order setting the long distance rates which Bell Canada (which operates in Ontario and Quebec) must charge its subscribers. Bell Canada challenges the Order in Ontario under the Judicial Review Procedure Act and succeeds in setting it aside. Unless Bell Canada launches separate proceedings in Quebec, the CRTC order will continue to apply in that province.

British Columbia recognizes that the Canada-wide enforcement of certain types of judgments and orders is in some circumstances a laudable objective, but submits that this is an objective which may be achieved without suffering the burdens of a separate federal court.

A helpful analogy may be taken from the field of criminal law whereby Parliament has expressly declared that certain court orders, such as subpoenas, warrants of arrest, warrants of committal and summonses issued by provincial superior courts have effect anywhere in Canada according to their terms (Criminal Code, R.S.C. 1985, c. C-46, ss. 702, 703, 703.1).

In the same way, as part of the reform package restoring a unitary court system in Canada, Parliament should enact a provision dictating that, in certain specified circumstances - in which the arguments for Canada-wide Orders are especially compelling - an Order made by any provincial court applies throughout Canada unless the Court otherwise orders or until it is set aside by the Court of Appeal for that province. (It is noted that the specific areas in respect of which this law would apply do not necessarily have to be confined to areas of present Federal Court jurisdiction). In this way, the benefits of cross-Canada enforcement of Orders would be achieved without any of the disadvantages of a dual court system.

5. Implementing Reform

It is the position of the Attorney General of British Columbia that the reform suggested in this paper would best be carried out by passing legislation merging the jurisdiction and judges of the Federal Court of Canada into the existing provincial court systems.

The transfer of jurisdiction from the Federal Court to the provincial courts would be effected by an Act of Parliament. The approach suggested by British Columbia

would be for the Parliament of Canada to pass an enactment dismantling the Court in three phases.

Phase I would involve setting a deadline after which the Court would entertain no new cases. Upon expiry of this deadline, the provision for Canada-wide Orders discussed above would come into effect, as would legislation providing for administrative appeals from federal statutory tribunals. Phase II would set a further deadline for the court to clear its existing docket, during which time the Court's infrastructure would be maintained. Phase III would provide for the dismantling of the Court's infrastructure and the appointment of its judges to the courts of the provinces according to a formula based on workload or perhaps province of origin. The 27 judges of the Court would of course be given the option of accepting alternate federal judicial appointments.

It should be noted at the outset that the implementation of this proposal would clearly be a cost saving measure for the Canadian taxpayer.

Immediate savings would be realized by preventing the construction costs of a proposed new headquarters for the Court in Ottawa. At the time of writing, a Project

Co-Ordinator has been designated to oversee this major undertaking. A Wellington Street location has been selected for the new building and space requirements for the Court have been approved by Treasury Board. In October, 1989, a further submission will be presented to Treasury Board to approve a budget for the building.

Dismantling the Court's existing infrastructure and merging its judges into existing provincial court systems would also effect significant savings. On this point, it should be observed that the Court's membership has more than doubled since 1971 (from 12 to 27 judges), with further increases presently under consideration by the federal Government. As for the Court's budget, the Federal Detailed Estimates Book reveals that there has been an increase from $5.5 million in 1982/83 to $17.1 million for 1989/90, an increase of over 200% in the last seven years. Staffing increased from 147 to 268 over the same period, for an increase of 82.3%.

Dismantling the Court's infrastructure and merging its judges into existing provincial court systems would necessarily create economies of scale which would ease the burden on the Canadian taxpayer.

Also, because the majority of the Court's work is concentrated in the national capital area, many of the Court's judges would join the Ontario or Quebec Courts. There would accordingly be minimal physical upheaval and dislocation for the judges themselves.

The integration of the present complement of 27 judges of the Federal Court into provincial superior court systems does, however, present one problem which should be addressed, and that is whether these judges are even appointable to the superior courts of the provinces in view of section 97 of the Constitution Act, 1867 which requires the judges of those courts to be "selected from the respective Bars of those provinces". It is trite law that once a person is appointed to the Bench, he ceases to be a member of the Bar of that province: Maurice v. Priel (April 27, 1989, unreported, S.C.C.).

It is submitted that, once the decision is made as to which judges will join which provincial court system, the section 97 problem could easily be overcome by the relevant province passing a law deeming the judge or judges in question to be members of the Bar of that Province. There would be no constitutional impediment to the enactment of such a law by a province: Constitution Act, 1867, ss. 92(13) and (16).

In British Columbia, matters would be even simpler where the Federal Court judge in question was previously a member of the Bar of this province. By virtue of section 400 of the Law Society Rules, a Federal Court Judge who was previously a member of the Law Society of British Columbia may be reinstated as a member simply by applying to the Law Society. Upon reinstatement, that person could be appointed to the British Columbia Courts in the usual way. To the extent that the other Law Societies possess rules to this effect, and assuming that most or all of the Judges would return to their province of origin, the infusion of Federal Court judges into provincial court systems could be carried out without the need for legislation.

Either way, section 97 of the Constitution Act, 1867 does not present a significant impediment to merging the existing complement of Federal Court judges into the provincial courts.

6. Conclusion

The premise that a unitary court system for Canada is superior to a dual court system is compelling. None of the arguments in favour of the existence of the Federal Court of Canada justify departing from this premise.

At its best, the Federal Court of Canada is superfluous, expensive, inaccessible to most Canadians and is vested with a concurrent jurisdiction which encourages forum shopping. At its worst, the Court's existence has resulted in a unremitting torrent of cases regarding its jurisdiction, and has been the cause of multiple litigation, inconsistent findings as between provincial and federal courts in respect of the same delict, and unnecessary expense to litigants who must commence numerous court proceedings arising out of that delict. These jurisdictional and practical problems have moved at least one Federal Court judge to lament that "the jurisdictional perils must be, to all those potential litigants, mystifying and frightening": Pacific Western Airlines v. The Queen, [1979] 2 F.C. 476 (T.D.) at 490.

Ottawa's periodic proposals to "reform" the Federal Court of Canada have been inadequate to address the Court's principal deficiencies, which are flaws inherent in any dual court system compounded by the Court's constitutional limitations. In view of these intrinsic limitations on the Court, the proposals for merger advanced herein are the only sensible means of achieving the ultimate end of the administration of justice, which is to serve the public by providing a court system which facilitates the just, speedy and inexpensive resolution of every proceeding on its merits.